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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XG817

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Rocky Intertidal Monitoring Surveys along the Oregon and California Coasts

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; incidental harassment authorization; request for comments on proposed Renewal.

SUMMARY: NMFS received a request from the Partnership for Interdisciplinary Study of Coastal Oceans (PISCO) at the University of California Santa Cruz (UCSC) for the Renewal of their currently active incidental harassment authorization (IHA) to take marine mammals incidental to rocky intertidal monitoring surveys along the coasts of Oregon and California. These activities are nearly identical to those covered in the current authorization. Pursuant to the Marine Mammal Protection Act, prior to issuing the currently active IHA, NMFS requested comments on both the proposed IHA and the potential for renewing the initial authorization if certain requirements were satisfied. The Renewal requirements have been satisfied and NMFS is now providing an additional 15-day comment period to allow for any additional comments on the proposed Renewal not previously provided during the initial 30-day comment period. Any comments received

on the potential Renewal, along with relevant comments on the initial IHA, have been considered in the development of this proposed IHA Renewal, and a summary of agency responses to applicable comments is included in this notice. NMFS will consider any additional public comments prior to making any final decision on the issuance of the requested Renewal, and agency responses will be summarized in the final notice of our decision.

DATES: Comments and information must be received no later than [insert date 15 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service. Physical comments should be sent to 1315 East-West Highway, Silver Spring, MD 20910 and electronic comments should be sent to *ITP.Pauline@noaa.gov*.

Instructions: NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period.

Comments received electronically, including all attachments, must not exceed a 25-megabyte file size. Attachments to electronic comments will be accepted in Microsoft Word or Excel or Adobe PDF file formats only. All comments received are a part of the public record and will generally be posted online at <https://www.fisheries.noaa.gov/node/23111> without change. All personal identifying information (e.g., name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Rob Pauline, Office of Protected Resources, NMFS, (301) 427-8401. Electronic copies of the original application, Renewal request, and supporting documents (including NMFS **Federal Register** notices of the original proposed and final authorizations, and the previous IHA), as well as a list of the references cited in this document, may be obtained online at:

<https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>. In case of problems accessing these documents, please call the contact listed above.

SUPPLEMENTARY INFORMATION:

Background

The Marine Mammal Protection Act (MMPA) prohibits the “take” of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed incidental take authorization is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other “means of effecting the least practicable adverse impact” on the affected

species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stocks for taking for certain subsistence uses (referred to here as “mitigation measures”). Monitoring and reporting of such takings are also required. The meaning of key terms such as “take,” “harassment,” and “negligible impact” can be found in section 3 of the MMPA (16 U.S.C. 1362) and the agency’s regulations at 50 CFR 216.103.

50 CFR 216.107(e) of NMFS’ regulations implementing the MMPA indicate that IHAs may be renewed for additional periods of time not to exceed one year for each reauthorization. In the notice of proposed IHA for the initial authorization, NMFS described the circumstances under which we would consider issuing a Renewal for this activity, and requested public comment on a potential Renewal under those circumstances. Specifically, on a case-by-case basis, NMFS may issue a one-year IHA Renewal when (1) another year of identical or nearly identical activities as described in the Specified Activities section is planned or (2) the activities would not be completed by the time the IHA expires and a second IHA would allow for completion of the activities beyond that described in the Dates and Duration section, provided all of the following conditions are met:

- A request for Renewal is received no later than 60 days prior to expiration of the current IHA.
- The request for Renewal must include the following:
 - (1) An explanation that the activities to be conducted beyond the initial dates either are identical to the previously analyzed activities or include changes so minor (*e.g.*, reduction in pile size) that the changes do not affect the previous analyses, take estimates, or mitigation and monitoring requirements.

(2) A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized.

- Upon review of the request for Renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures remain the same and appropriate, and the initial findings remain valid.

An additional public comment period of 15 days (for a total of 45 days), with direct notice by email, phone, or postal service to commenters on the initial IHA, is provided to allow for any additional comments on the proposed Renewal. A description of the Renewal process may be found on our website at:

<https://www.fisheries.noaa.gov/iha-renewals>.

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 et seq.) and NOAA Administrative Order (NAO) 216-6A, NMFS must review our proposed action (i.e., the issuance of an IHA) with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 (IHAs with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216-6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has preliminarily

determined that the issuance of the Renewal IHA qualifies to be categorically excluded from further NEPA review.

We will review all comments submitted in response to this notice prior to concluding our NEPA process or making a final decision on the IHA request.

History of Request

On March 8, 2018, NMFS issued an IHA to PISCO to take marine mammals incidental to rocky intertidal monitoring surveys at multiple locations on the coasts of Oregon and California (83 FR 11696; March 16, 2018), effective from March 12, 2018 through March 11, 2019. This multiyear annual survey involves surveying rocky intertidal zones in a number of coastal locations in Oregon and California. NMFS has previously issued five IHAs for this ongoing survey project (77 FR 72327, December 5, 2012; 78 FR 79403, December 30, 2013; 79 FR 73048, December 9, 2014; 81 FR 7319, February 2, 2016; 82 FR 12568, March 6, 2017). On January 8, 2019, NMFS received an application for a Renewal of that 2018 IHA (referred to as the initial IHA henceforth). As described in the application for Renewal, the activities for which incidental take is requested are nearly identical to those covered in the initial IHA. As required, the applicant also provided a preliminary monitoring report (available at <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-research-and-other-activities>) which confirms that the applicant has implemented the required mitigation and monitoring, and which also shows that no impacts of a scale or nature not previously analyzed or authorized have occurred as a result of the activities conducted.

Description of the Specified Activities and Anticipated Impacts

PISCO proposes to continue rocky intertidal monitoring work that has been ongoing for 20 years. PISCO focuses on understanding the nearshore ecosystems of the U.S. west coast through a number of interdisciplinary collaborations. The program integrates long-term monitoring of ecological and oceanographic processes at 154 separate sites with experimental work in the lab and field. Research is conducted throughout the year along the California and Oregon coasts and will continue as long as funding is available. The research being conducted under the Renewal would be nearly identical to that analyzed under the initial IHA (one new site added, but no take of marine mammals anticipated), and the anticipated impacts are identical. Researchers accessing and conducting research activities on the sites may occasionally cause behavioral disturbance (or Level B harassment) of three pinniped species at 16 of the sites (described in PISCO's application for the 2018 IHA). PISCO's request is for take of California sea lions (*Zalophus californianus*), harbor seals (*Phoca vitulina richardii*), and northern elephant seals (*Mirounga angustirostris*). PISCO expects that the disturbance to pinnipeds from the research activities will be minimal and will be limited to Level B harassment, as described in the documents associated with the initial IHA.

Detailed Description of the Activity

A detailed description of rocky intertidal monitoring survey activities for which take is authorized here may be found in the Notices of the Proposed and Final IHA for the initial IHA. Overall, the specified geographic region, the amount of activity, and the nature of the activities are identical to those described in previous notices. The frequency of visits and total visits to a particular site may vary across years, and within an annual plan once submitted, but the description of the action and the marine mammal analysis

included in the 2018 IHA were designed to capture such variations. As noted above, 154 sites are visited and surveyed as part of the research, although take of marine mammals does not occur at every site. A few sites are visited monthly, while many sites are surveyed between 1 and 4 times annually. In 2018, a new site that had never been surveyed previously (Waddell) was added to the site inventory as part of a study examining ecosystem level effects of sea star wasting syndrome (SSWS). There are also six additional biodiversity sites (i.e., Ecola, Roads End, Otter Rock, Seal Rock, Graduation Point and North Head) that were not visited or analyzed as part of the initial IHA. The proposed Renewal would be effective for a period of one year from the date of issuance.

Description of Marine Mammals

A description of the marine mammals in the areas of the activity for which authorization of take is proposed may be found in the Notice of the Proposed IHA (83 FR 3308; February 23, 2018) for the initial authorization. NMFS has reviewed the monitoring data from the initial IHA, recent draft Stock Assessment Reports, information on relevant Unusual Mortality Events, and other scientific literature, and determined that neither this nor any other new information affects which species or stocks have the potential to be affected or the pertinent information in the Description of the Marine Mammals in the Area of Specified Activities contained in the supporting documents for the initial IHA.

Potential Effects on Marine Mammals and their Habitat

A description of the potential effects of the specified activity on marine mammals and their habitat for the activities for which take is proposed may be found in the Notice

of the Proposed IHA (83 FR 3308; February 23, 2018) for the initial authorization. NMFS has reviewed the monitoring data from the initial IHA, recent draft Stock Assessment Reports, information on relevant Unusual Mortality Events, and other scientific literature, and determined that no new information affects our initial analysis of impacts on marine mammals and their habitat.

Estimated Take

Detailed descriptions of the methods and inputs used to estimate take for the specified activity are found in the **Federal Register** Notices of the Proposed (83 FR 3308; February 23, 2018) and Final IHA (83 FR 11696; March 16, 2018) for the initial authorization. As part of the initial IHA, PISCO had estimated that Level B harassment of marine mammals was likely to occur at 16 sites (see 2018 application), conservatively based on the predicted number of visits to the sites and historical observational data (using maximum observations). These same 16 sites would be surveyed under the proposed Renewal. PISCO is requesting and NMFS is proposing to authorize the same level of take for the 16 sites as was authorized under the initial IHA.

PISCO provided a preliminary draft marine mammal monitoring report covering March 12, 2018 through December 31, 2018 and recorded take by Level B harassment of 87 harbor seals and 1 California sea lion. No northern elephant seal takes were reported. This is well below the total take numbers authorized by NMFS in 2018 (255 harbor seal, 90 California sea lion, and 50 northern elephant seal). The draft monitoring report indicated that take by Level B harassment was recorded at eight sites in 2018 (of 64 sites visited and 5 of the 16 sites at which take was expected). At one site (Government Point), 20 more harbor seals were taken than were predicted at that site, however, at other sites

fewer marine mammals were taken than predicted. Variation in predicted marine mammal presence is expected across sites, and, further, as described in the 2018 application and IHA notices, the number of predicted visits to a particular site may also vary. However, the conservative take estimate methodology is expected to continue to ensure that the total authorized take and effect analysis remains appropriate.

There is one new site, Waddell, which was not addressed in the initial IHA, since PISCO had not secured funding for the SSWS study when the initial authorization was issued. PISCO did, however, monitor and record observations during 10 visits to Waddell between March and December 2018 after funding had been secured and recorded one harbor seal. Seals are known to be rare at the Waddell site, and with only a single observation over a ten month period at this location, PISCO and NMFS do not believe that take is likely. Therefore, we are not proposing to increase the total numbers of authorized take for harbor seals. There are also six biodiversity sites which would be visited in 2019 that were not visited or analyzed as part of the initial IHA. However, based on historical monitoring records the presence of marine mammals is unlikely and take is not proposed at any of these sites.

Accordingly, NMFS proposes to authorize take by Level B harassment at the same levels that were authorized under the initial IHA as shown in Table 1 below.

Table 1. Authorized Take Numbers by Level B Harassment

Species	Authorized Take
Harbor seal	255
California sea lion	90
Northern elephant seal	50

Description of Proposed Mitigation, Monitoring and Reporting Measures

The proposed mitigation, monitoring, and reporting measures included as requirements in this authorization are identical to those included in the Federal Register Notice announcing the proposed issuance of the initial IHA. Additionally, the discussion of the least practicable adverse impact included in that document and the Notice of issuance of the IHA remains accurate. The following measures, which are identical to those in the initial IHA, are proposed here for the Renewal:

- Researchers shall observe a site from a distance, using binoculars if necessary, to detect any marine mammals prior to approach to determine if mitigation is required;
- Researchers shall approach a site with caution (slowly and quietly), keep bodies low to the ground and avoid pinnipeds along access ways to sites, by locating and taking a different access way if possible;
- Researchers shall keep a safe distance from and not approach any marine mammal while conducting research, unless it is absolutely necessary to flush a marine mammal in order to continue conducting research (i.e. if a site cannot be accessed or sampled due to the presence of pinnipeds);
- Researchers shall monitor the offshore area for predators (such as killer whales and white sharks) and avoid flushing of pinnipeds when predators are observed in nearshore waters;
- Intentional flushing shall be avoided if pups are present. Staff shall reschedule work at sites where pups are present, unless other means of accomplishing the work can be done without causing disturbance to mothers and dependent pups;
- Any site where Steller sea lions, northern fur seals, or Guadalupe fur seals are present shall not be approached and shall be sampled at a later date;
- Personnel shall vacate the study area as soon as sampling of the site is completed;

- Detailed monitoring information will include species counts, number of disturbances, description of disturbance behaviors, and information regarding physical and biological conditions at a given site;
- Submit a draft monitoring report to NMFS Office of Protected Resources within 60 days after the conclusion of the 2018-2019 field season or 60 days prior to the start of the next field season if a new IHA will be requested; and
- Reporting injured or dead marine mammals to appropriate authorities.

Public Comments

As noted previously, NMFS published a notice of a proposed IHA (83 FR 3308; February 23, 2018) and solicited public comments on both our proposal to issue the initial IHA for rocky intertidal monitoring surveys and on the potential for a Renewal, should certain requirements be met. All public comments were addressed in the notice announcing the issuance of the 2018 IHA (83 FR 11696; March 16, 2018). Below, we describe how we have addressed, with updated information where appropriate, any comments received that specifically pertain to the Renewal of the 2018 IHA.

Comment: The Commission requested clarification of certain issues associated with NMFS's notice that one-year Renewals could be issued in certain limited circumstances and expressed concern that the process would bypass the public notice and comment requirements. The Commission also suggested that NMFS should discuss the possibility of Renewals through a more general route, such as a rulemaking, instead of notice in a specific authorization. The Commission further recommended that if NMFS did not pursue a more general route, that the agency provide the Commission and the public with a legal analysis supporting our conclusion that this process is consistent with the requirements of section 101(a)(5)(D) of the MMPA.

Response: The notice of the proposed initial IHA expressly notified and invited comment from the public on the possibility that under certain, limited conditions the applicant could seek a Renewal IHA for an additional year. The notice described the conditions under which such a Renewal request could be considered and expressly sought public comment in the event such a Renewal were sought. Further, since issuance of the initial IHA NMFS has modified the Renewal process to provide notice through the **Federal Register** and an additional 15-day public comment period at the time the Renewal IHA is requested. NMFS also will provide direct notice of the proposed Renewal to those who commented on the initial IHA, to provide an opportunity to submit any additional comments.

We appreciate the Commission's suggestion that NMFS discuss the potential for IHA Renewals through a more general route, such as a rulemaking. However, utilizing the public comment process associated with IHAs is more efficient for the agency, while still providing for appropriate public input into NMFS' decision-making. Further, NMFS' recent modification to the Renewal process (i.e., soliciting additional public comment at the time of a Renewal request) should alleviate the Commission's concern about the lack of additional public comment and need for a more general rulemaking.

For more information, NMFS has published a description of the Renewal process on our website (available at <https://www.fisheries.noaa.gov/iha-renewals>).

Preliminary Determinations

In the context of the activities that will result in take of marine mammals, the rocky intertidal monitoring surveys planned by PISCO for 2019 are nearly identical to those conducted under the initial IHA in 2018. A new SSWS and six biodiversity sites

would be visited under the proposed Renewal that were not analyzed for the initial IHA, but no takes are anticipated or requested for these locations. These activities could result in Level B harassment consisting of temporary, short-term behavioral disturbance. In analyzing the effects of the activities in the initial IHA, and in consideration of the implementation of the required mitigation, NMFS determined that the total marine mammal take from PISCO's rocky intertidal monitoring program would not adversely affect annual rates of recruitment or survival and, therefore, would have a negligible impact on the affected species or stocks. NMFS also concluded that the numbers of animals authorized for take could be considered small relative to the relevant species or stocks (0.65–0.82 percent for harbor seals, and <0.01 percent for California sea lions and northern elephant seals). As discussed above, the same amount of take is proposed for authorization under this Renewal.

Based on the information and analysis contained here and in the referenced documents, NMFS has determined the following: (1) the required mitigation measures will effect the least practicable impact on marine mammal species or stocks and their habitat; (2) the authorized takes will have a negligible impact on the affected marine mammal species or stocks; (3) the authorized takes represent small numbers of marine mammals relative to the affected stock abundances; (4) PISCO's activities will not have an unmitigable adverse impact on taking for subsistence purposes as no relevant subsistence uses of marine mammals are implicated by this action; and (5) appropriate monitoring and reporting requirements are included.

Endangered Species Act

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA: 16 U.S.C. 1531 et seq.) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally, in this case with the ESA Interagency Cooperation Division whenever we authorize take for endangered or threatened species.

No incidental take of ESA-listed species is authorized or expected to result from this activity. Therefore, NMFS has determined that formal consultation under section 7 of the ESA is not required for this action.

Proposed Renewal and Request for Public Comment

As a result of these preliminary determinations, NMFS proposes to issue an IHA to PISCO for conducting rocky intertidal monitoring surveys off the coasts of Oregon and California for a period of one year, provided the previously described mitigation, monitoring, and reporting requirements are incorporated. A draft of the proposed IHA can be found at <https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>. We request comment on our analyses, the proposed Renewal, and any other aspect of this Notice. Please include with your comments any supporting data or literature citations to help inform our final decision on the request for MMPA authorization.

Dated: March 1, 2019.

Donna S. Wieting,

Director, Office of Protected Resources,

National Marine Fisheries Service.

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